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California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD M. MEJIA,

Defendant and Appellant.

B287409

(Los Angeles County
Super. Ct. No. BA425671)

**ORDER MODIFYING
OPINION; AND DENYING
PETITION FOR REHEARING
[NO CHANGE IN JUDGMENT]**

The opinion filed March 19, 2019, and not certified for publication, is modified as follows:

1. On page 12, the last sentence of the paragraph, add a comma and the words “, nor did the court err in denying Mejia’s motion for a new trial based on the failure to instruct on voluntary manslaughter.”

The sentence, as modified, reads:

The trial court did not err in denying Mejia's request for an instruction on voluntary manslaughter, nor did the court err in denying Mejia's motion for a new trial based on the failure to instruct on voluntary manslaughter.

2. On page 12, delete footnote 4 and insert in its place the following footnote 4:

⁴ Citing *Mullaney v. Wilbur* (1975) 421 U.S. 684, Mejia argues that, "when there is evidence in a murder case of provocation," the prosecution must prove beyond a reasonable doubt the defendant did not act in the heat of passion. In *Mullaney*, a murder case where the issue of heat of passion was clearly raised by the evidence, the United States Supreme Court held that "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." (*Id.* at p. 704.) *Mullaney*, however, does not require the prosecution to prove the absence of heat of passion in every murder case, but only when the issue is "properly presented." (*Ibid.*) In *People v. Rios* (2000) 23 Cal.4th 450 the California Supreme Court held that the issue of heat of passion is "properly presented" under *Mullaney* when "the People's own evidence suggests that the killing may have been provoked" or when the defense makes a showing of provocation. (*Rios*, at pp. 461-462.) Here, the heat of passion issue was not "properly presented" because there was no evidence the killing was provoked.

This order does not change the judgment. Appellant's petition for rehearing is denied.

ZELON, Acting P. J.
FEUER, J.

SEGAL, J.

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(Los Angeles County
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APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald S. Coen, Judge. Affirmed and remanded.

Matthew Alger, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Stephanie A. Miyoshi and Kristen J. Inberg, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted Richard Mejia of second degree murder (Pen. Code, § 187, subd. (a)),¹ possession of a firearm by a felon (two counts) (§ 29800, subd. (a)(1)), and carjacking (§ 215, subd. (a)). The jury also found true gang and firearm allegations. Mejia argues the trial court should have instructed the jury on voluntary manslaughter because there was substantial evidence he killed the victim in the heat of passion. Mejia also argues the trial court should have the opportunity on remand to exercise discretion, under a recent amendment to section 1385, subdivision (b), whether to strike the five-year enhancement the court imposed under section 667, subdivision (a)(1). Because there was no substantial evidence to support giving an instruction on voluntary manslaughter, we affirm Mejia's conviction. Because the trial court did not clearly indicate it would not exercise discretion to strike the five-year enhancement, we remand for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Mejia Kills Vasquez After an Argument*

Mejia, Vincent Vasquez, and two other members of the Venice 13 criminal street gang met one evening at a strip club to watch a boxing match. Mejia, who was in his mid-30s, was a senior member of Venice 13. Vasquez was a younger, more junior member. At 2:00 a.m. the four men left the club and drove to a

¹ Statutory references are to the Penal Code.

nearby fast food restaurant where Vasquez was going to sell Pricilla Lucero methamphetamine.

When Vasquez arrived, Lucero was sitting in her car in the parking lot, waiting for him. Vasquez went to Lucero's car and sat in the passenger seat. The other three men waited in the parking lot while Vasquez sold Lucero methamphetamine and smoked some of it with her. Vasquez told Lucero his friends did not want him to smoke methamphetamine. Vasquez eventually got out of Lucero's car and stood in front of it.

When Vasquez got out of Lucero's car, he and Mejia got into an argument. The argument started when Vasquez yelled to the three other men that "there was change of plans." Mejia reacted angrily and aggressively, complaining Vasquez was always changing his plans, which Mejia thought would get Vasquez "caught up" or arrested by the police. Mejia said to Vasquez, "You always change plans. You are always, you know, you can never get your plans straight." Mejia spoke in a "loud, angry tone of voice."² Vasquez was not particularly concerned about Mejia's statement and essentially "brushed it off."

According to Lucero's statement to the police, she said to Mejia and Vasquez, "Look, it's none of my business what—I don't know what's going on That's between you guys, but I'm hungry." At that point, Mejia offered Lucero a taco, which she

² Mejia was upset with Vasquez from an incident earlier in the day. Vasquez had called Mejia and asked Mejia to bring him a "strap," or gun. Mejia, however, had not been able to find Vasquez and was angry Vasquez had him "on a wild goose chase." Mejia asked Vasquez, "How am I gonna give you a strap, and you're out rolling around, you know, all fuckin' paranoid, and you have me picking you up?"

declined. Mejia then asked Vasquez, “Well, you want a taco, dog?” Vasquez said, “I don’t want your fuckin’ taco.” Lucero knew Mejia was Vasquez’s “older homeboy,” and she did not understand why Vasquez was “disrespecting him like that.” Mejia threw the taco at Vasquez. Vasquez got “pumped up” and said, “Man, fuck this nigga.” Vasquez said to Mejia, “What, fool,” which Lucero thought “ticked [Mejia] off.” Mejia pulled out a “black Magnum” handgun from his waistband and placed it on the tailgate of his pickup truck. Mejia said to Vasquez, “Get it. Get it.” Mejia began “blurting out a lot of shit” about Vasquez and said “he was no good.” Vasquez said, “Man, shut the fuck up. . . . What are you gonna do,” which Lucero described as Vasquez “calling it out” or giving Mejia “a challenge.” Mejia said, “I’m gonna show you what I’m gonna do.” Mejia picked up the gun and shot Vasquez in the chest.

At trial, Lucero contradicted the statements she made in her interview with the police. She explained she was scared to testify in a homicide case and had been avoiding the police until they finally arrested her for failing to comply with a subpoena ordering her to come to court. Lucero testified she did not remember telling the detectives about the argument between Mejia and Vasquez. She also said she did not remember Vasquez disrespecting Mejia, Mejia throwing a taco at Vasquez, Vasquez saying something to Mejia that “pissed [him] off,” or Mejia telling Vasquez he “was no good.” She also testified she did not remember Mejia pulling out a gun, but stated instead that it was Vasquez who had the gun. She did remember Vasquez saying, “Shut up,” but she did not remember to whom he was speaking. Lucero stated that Mejia was older and had “respect” and that

Vasquez “seemed kind of scared of him.” She also stated Mejia was not the shooter.

After the shooting, the three men drove away quickly. A homeless man sleeping in a truck in the parking lot called 911. The man told the operator that he heard five loud shots and that Vasquez was on the ground bleeding with wounds to his chest. Vasquez died soon after the shooting.

B. Mejia Eludes Capture and Commits Carjacking

Eight months later, police officers went to the strip club to look for Mejia. Mejia saw them, went to the valet stand in the club’s parking lot, and got into the passenger seat of a car. When Mejia stuck a hard object in the attendant’s side and said it was a gun, the attendant let Mejia take the car. Later that evening, officers found the car abandoned.

C. Mejia Escapes Again, but Is Finally Arrested

Three months after the incident with the valet, a police officer saw Mejia driving near a school. The officer turned on his patrol car’s lights and siren and tried to arrest Mejia. Mejia drove through a stop sign and into a cul-de-sac, jumped out of the car while it was still moving, and fell to the ground, dropping a cell phone and a .45 caliber handgun in the street where he fell. The car crashed into two parked cars, and Mejia ran into the backyard of a house.

Four weeks later, during a probation search of the home of a Venice 13 gang member, police arrested Mejia after a chase. When they caught Mejia, the officers found a loaded nine-millimeter handgun on the ground next to him.

D. *The People Introduce Gang Evidence*

David Dalzell, a detective with the Los Angeles Police Department, testified that Venice 13 is a predominately Hispanic criminal street gang. Detective Dalzell testified about the gang's hierarchical structure and how younger, newer members have lower status than older members. He explained that younger members have to treat older members with respect and deference. The detective stated that disruptions in the gang hierarchy are detrimental to gang business and that senior members of the gang do not tolerate disrespect from junior members.

E. *The Jury Convicts Mejia of Multiple Crimes*

The People charged Mejia with the murder of Vasquez, carjacking in connection with Mejia's subsequent attempt to evade police, and three counts of possession of a firearm by a felon (one of which the court dismissed). In connection with the murder count, the People alleged Mejia personally used a firearm within the meaning of section 12022.53, subdivision (b), personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivision (c), and personally and intentionally discharged a firearm causing great bodily injury or death within the meaning of section 12022.53, subdivision (d). In connection with the carjacking count, the People alleged Mejia personally used a firearm within the meaning of section 12022.53, subdivision (b). And in connection with all counts, the People alleged Mejia committed the offenses for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members, within the meaning of section 186.22,

subdivision (b)(1). The People also alleged that Mejia had a prior conviction for a felony that was a serious felony within the meaning of section 667, subdivision (a)(1), and a serious or violent felony within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12) and that Mejia had served four prior prison terms within the meaning of section 667.5, subdivision (b).³

At trial, Mejia asked the trial court to instruct the jury on the heat of passion form of voluntary manslaughter. Citing *People v. Chestra* (2017) 9 Cal.App.5th 1116, the trial court refused to give the instruction, ruling substantial evidence did not support such an instruction. The court stated: “Here, merely because there may have been testimony as to an argument, if there was such, is insufficient in and of itself to show that there was sufficient heat of passion based on adequate provocation warranting such instruction.”

The jury convicted Mejia on all counts and found true all gang and firearm allegations, and the court sentenced him to an aggregate prison term of 77 years eight months to life. The court selected the carjacking conviction as the base term and sentenced Mejia to the middle term of five years, doubled to 10 years under the three strikes law. (§§ 215, subd. (b), 667, subd. (e)(1), 1170.12, subd. (c)(1).) On one of the convictions for possession of a firearm as a felon, the court imposed one-third the middle term of two years, or eight months, doubled to one year four months, (§§ 186.22, subd. (a), 29800, subd. (a)(1), 667, subd. (e)(1),

³ The prior conviction was for possession of a firearm by a felon for the benefit of a criminal street gang, which is a serious felony. (See *People v. Briceno* (2004) 34 Cal.4th 451, 457.)

1170.12, subd. (c)(1)), plus one-third the middle term of three years, or one year, for the gang enhancement under section 186.22, subdivision (b)(1)(A). On the other conviction for possession of a firearm as a felon, the court imposed one-third the middle term of two years, or eight months, doubled to one year four months, plus one-third the middle term of three years, or one year, for the gang enhancement. On the conviction for second degree murder, the court imposed an indeterminate term of 30 years to life (15 to life, doubled) and “denied parole for a period of 15 years,” stating section 186.22, subdivision (b)(5), controlled over section 186.22, subdivision (b)(1). Finally, the court imposed a term of 25 years to life under section 12022.53, subdivision (d), one five-year term under section 667, subdivision (a)(1), and three one-year terms under section 667.5, subdivision (b). Mejia timely appealed.

DISCUSSION

A. *Substantial Evidence Did Not Support an Instruction on Voluntary Manslaughter Based on Killing in the Heat of Passion*

1. *Applicable Law*

“Murder is the unlawful killing of a human being . . . with malice aforethought.’ [Citation.] ‘Manslaughter is the unlawful killing of a human being without malice.’ Manslaughter is a lesser included offense of murder, and a defendant who commits an intentional and unlawful killing but who lacks malice is guilty of voluntary manslaughter. Heat of passion is one of the mental states that precludes the formation of malice and reduces an

unlawful killing from murder to manslaughter.” (*People v. Nelson* (2016) 1 Cal.5th 513, 538; see *People v. Enraca* (2012) 53 Cal.4th 735, 758-759 [murder “may be reduced to voluntary manslaughter if the victim engaged in provocative conduct that would cause an ordinary person with an average disposition to act rashly or without due deliberation and reflection”].) “Heat of passion, then, is a state of mind caused by legally sufficient provocation that causes a person to act, not out of rational thought but out of unconsidered reaction to the provocation. While some measure of thought is required to form either an intent to kill or a conscious disregard for human life, a person who acts without reflection in response to adequate provocation does not act with malice.” (*People v. Beltran* (2013) 56 Cal.4th 935, 942.)

“A heat of passion theory of manslaughter has both an objective and a subjective component. [Citations.] [¶] “To satisfy the objective or ‘reasonable person’ element of this form of voluntary manslaughter, the accused’s heat of passion must be due to ‘sufficient provocation.’” [Citations.] ‘[T]he factor which distinguishes the “heat of passion” form of voluntary manslaughter from murder is provocation. . . . The provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. [Citations.]’ [Citation.] [¶] To satisfy the subjective element of this form of voluntary manslaughter, the accused must be shown to have killed while under ‘the actual influence of a strong passion’ induced by such provocation. [Citation.] ‘Heat of passion arises when “at the time of the killing, the reason of the accused was obscured or disturbed

by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.”” (*People v. Moye* (2009) 47 Cal.4th 537, 549-550; see *Nelson, supra*, 1 Cal.5th at p. 539 “[t]he facts and circumstances must be “sufficient to arouse the passions of the ordinarily reasonable man,”” and “the defendant must ‘*actually* be motivated by passion in committing the killing;’ that is, he or she must be acting ““under the smart of that sudden quarrel or heat of passion”””].)

““To justify a lesser included offense instruction, the evidence supporting the instruction must be substantial—that is, it must be evidence from which a jury composed of reasonable persons could conclude that the facts underlying the particular instruction exist.”” (*People v. Enraca, supra*, 53 Cal.4th at p. 758.) “This substantial evidence requirement is not satisfied by “*any* evidence . . . no matter how weak,” but rather by evidence from which a jury composed of reasonable persons could conclude ‘that the lesser offense, but not the greater, was committed.’” (*People v. Avila* (2009) 46 Cal.4th 680, 705.) “[W]e review independently the question whether the trial court improperly failed to instruct on a lesser included offense.” (*Nelson, supra*, 1 Cal.5th at p. 538; see *People v. Chestra, supra*, 9 Cal.App.5th at p. 1122.)

2. *There Was Insufficient Evidence To Support a Heat of Passion Instruction*

Mejia argues the trial court erred by refusing his request to instruct the jury on voluntary manslaughter based on killing in the heat of passion because the argument between Mejia and

Vasquez warranted giving the instruction. There was no substantial evidence, however, to support either component of heat-of-passion voluntary manslaughter.

Objectively, the verbal exchange of insults and threats was not ““sufficient to cause an “ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.””””” (People v. Landry (2016) 2 Cal.5th 52, 97.) Mejia taunted Vasquez and threw a taco at him because Mejia was angry with Vasquez for changing his plans. According to Lucero, Vasquez disrespected Mejia by refusing the taco. When Mejia subsequently insulted Vasquez, Vasquez told him to “shut the fuck up” and challenged him. Disrespecting a senior gang member by refusing a taco and shouting “insults or gang-related challenges” is not “sufficient provocation in an *ordinary* person to merit an instruction on voluntary manslaughter.” (People v. Enraca, *supra*, 53 Cal.4th at p. 759; see People v. Avila, *supra*, 46 Cal.4th at p. 706 [“[r]easonable people do not become homicidally enraged when hearing . . . a fleeting gang reference or challenge”]; People v. Gutierrez (2009) 45 Cal.4th 789, 826 [“a voluntary manslaughter instruction is not warranted where the act that allegedly provoked the killing was no more than taunting words”]; People v. Manriquez (2005) 37 Cal.4th 547, 586 [verbal taunts and calling the defendant a “motherfucker” were insufficient to cause an average person to become so inflamed as to lose reason and judgment].) Harsh words, even from a younger, disrespectful junior gang member to his or her superior, do not justify an instruction on voluntary manslaughter.

Nor was there substantial evidence that Mejia was subjectively under the influence of a strong passion induced by

provocation or that his reason was in any way disturbed or obscured. The evidence, rather, demonstrated the opposite. Mejia was the aggressor throughout his confrontation with Vasquez. Mejia removed a handgun from his waistband and placed it on the back of his pickup, dared Vasquez to pick it up, and when Vasquez told Mejia to “shut up,” Mejia shot him in the chest. As Mejia concedes, “it is not clear what particular statements or conduct on the part of Vasquez caused [Mejia] to have such a reaction.” The trial court did not err in denying Mejia’s request for an instruction on voluntary manslaughter.⁴

B. *Remand for Resentencing Is Appropriate*

At the time the trial court sentenced Mejia, section 1385, subdivision (b), prohibited trial courts from striking enhancements under section 667, subdivision (a)(1). The Legislature amended section 1385, effective January 1, 2019, to eliminate this prohibition, thereby giving trial courts discretion to strike these enhancements. (Stats. 2018, ch. 1013, §§ 1-2; see *People v. Garcia* (2018) 28 Cal.App.5th 961, 971 [the amendment to section 1385 will “allow a court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes”].) In a supplemental brief Mejia asks that we remand the case to allow the trial court to exercise discretion under amended section 1385, subdivision (b), to dismiss or strike the five-year enhancement under section 667, subdivision (a)(1).

⁴ Mejia also argues the trial court erred in denying his motion for a new trial based on the failure to instruct on voluntary manslaughter. This argument fails for the same reasons.

“When the retroactive application of a statute gives a trial court discretion to reconsider imposing a lower sentence than one previously imposed, it is the usual custom for an appellate court to remand the case to the trial court.” (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1105.) “Remand is required unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so.” (*Id.* at p. 1110; see *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081 [remand is appropriate where “the record does not ‘clearly indicate’ the court would not have exercised discretion to strike the firearm allegations had the court known it had that discretion”].)

The People assert “remand for resentencing is . . . unwarranted because the trial court’s statements at sentencing clearly indicate it would not have dismissed the enhancement in any event.” The record does not support the People’s assertion. The trial court did not clearly indicate it would not have stricken the enhancement under section 667, subdivision (a)(1), if it had the discretion to do so. Although the trial court declined to strike either Mejia’s prior serious felony conviction for purposes of the three strikes law or the firearm enhancements, the court said nothing indicating it would not strike the enhancement under section 667, subdivision (a)(1). Moreover, the trial court, rather than imposing upper terms on all of Mejia’s convictions, exercised discretion to impose the middle term on Mejia’s convictions for carjacking and his two convictions for possession of a firearm by a felon, as well as the middle term on several of the enhancements. In these circumstances, remand is appropriate. (See *People v. Billingsley*, *supra*, 22 Cal.App.5th at p. 1081 [remand was appropriate where

“the court did not express an intention to impose the maximum possible sentence”]; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 428 “[a]lthough the court imposed a substantial sentence on [the defendant], it expressed no intent to impose the maximum sentence,” and “[t]o the contrary, it imposed the [middle] term”).⁵

⁵ It appears the trial court erred in failing to impose five-year enhancements under section 667, subdivision (a)(1), and the one-year prior prison term enhancement under section 667.5, subdivision (b), on both of Mejia’s serious felony convictions (murder and carjacking). (See *People v. Minifie* (2018) 22 Cal.App.5th 1256, 1265 [“the prior prison term enhancements under section 667.5, subdivision (b), are to be applied once to the indeterminate sentence and once to the determinate sentence”]; *People v. Misa* (2006) 140 Cal.App.4th 837 [the section 667, subdivision (a)(1), enhancement applies separately to both indeterminate and determinate sentences].) On remand, the trial court will have the opportunity to exercise discretion whether to impose, dismiss, or strike either or both enhancements under section 667, subdivision (a)(1).

DISPOSITION

The conviction is affirmed. The matter is remanded for resentencing.

SEGAL, J.

We concur:

ZELON, Acting P. J.

FEUER, J.